

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 26, 1998

TO: Elizabeth Kinney, Regional Director, Region 13

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Teamsters Local 705, (Joyce Bros. Storage & Van Co.), Case 13-CB-15677

536-2581-0100, 536-2581-3358, 536-2581-3360, 536-2581-6700

This Section 8(b)(1)(A) case was submitted for advice on the issue of whether a union breached its duty of fair representation in its response to complaints of its members that they were losing work.

FACTS

Joyce Bros. Storage and Van Co. (Joyce) packs, loads, moves and warehouses office furniture and equipment. Joyce is a signatory to a collective-bargaining agreement with Teamsters Local 705 (Teamsters). The contract includes a jurisdiction clause which contains a "catchall provision." ⁽¹⁾ On January 14, 1998, Joyce employees represented by Teamsters were moving furniture at the offices of Midcon Natural Gas (Midcon). Representatives of United Brotherhood of Carpenters Local 558 (Carpenters) entered the situs, met with officials of Midcon and Joyce, and claimed for their members the work of taking down and reerecting modular furniture. Midcon told the Joyce employees to leave the site and not to return to work until the issue was resolved. Either Midcon or Executive Construction, Midcon's general contractor and a signatory to a contract with Carpenters, then hired another Carpenters signatory to do the disassembly and reassembly of the modular furniture.

On January 14, the Teamsters steward at the Midcon site (the Charging Party) complained of the foregoing to his Teamsters business representative. The representative said that it seemed that the Carpenters were raiding the operation and that he would look into the matter and get back to the Charging Party. He appeared to be encouraging.

On January 16, Joyce employees were recalled to work and thereafter continued to perform only furniture and equipment moving work at the Midcon premises. Carpenters-represented employees of another employer performed the assembly and the disassembly of the modular furniture. At lunchtime on that date, the Charging Party telephoned the Teamsters business representative, and told the representative that the Teamsters crew had been laid off the day before and, presumably, also that Carpenters-represented employees were doing work at the site. ⁽²⁾ The Charging Party also said that the Teamsters should have been protecting the unit employees and keeping them working, and "very heatedly" said that the Teamsters representative was not helping or protecting the employees. The Teamsters representative replied that he did not care as long as it hurt Joyce in its pocketbook.

About two to three weeks later there were discussions between representatives of Teamsters and Carpenters, with the result that Teamsters disclaimed the work of taking down and reerecting the modular furniture. The Carpenters had no objection to Teamsters' performing certain lesser disassembly and reassembly work, e.g., the detachment of swivel bases from and reattachment to chairs.

On February 11, the Charging Party filed a Section 8(b)(4)(D) charge against Carpenters and the instant Section 8(b)(1)(A) duty of fair representation charge against the Teamsters. On March 11, there was a Section 10(k) hearing in the 8(b)(4)(D) case. At the hearing, the Teamsters disclaimed the work of disassembling and reassembling the modular furniture, but the Charging Party presented a statement from other Teamsters-represented employees of Joyce that they wish to perform the disputed work. While there was disputed testimony on whether Joyce employees, both Teamsters members and unrepresented employees, had disassembled and reassembled modular furniture in the past, a preponderance of the evidence indicates that

they had done so. The Charging Party was present during the testimony regarding the meeting between the Teamsters and Carpenters and their agreement as to which work Teamsters and Carpenter-represented employees were to perform at the Midcon job site. As a result of the Teamsters' disclaimer, the hearing officer quashed the 10(k) hearing, but the Board subsequently reinstated the proceeding because the Charging Party and other employees of Joyce continued to claim the work.

ACTION

We concluded that the Section 8(b)(1)(A) charge herein should be dismissed, absent withdrawal.

A union that is the exclusive representative of bargaining unit employees is obligated to serve the interests of all the employees without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. ⁽³⁾ A union violates its duty of fair representation if its actions are either arbitrary, discriminatory, or taken in bad faith; however, something "more than mere negligence or the exercise of poor judgment on the part of the union must be shown in order to support a finding of arbitrary conduct." ⁽⁴⁾ The Board has held that a union's duty to avoid arbitrary conduct means "at least that there be a reason for action taken." ⁽⁵⁾

The Charging Party in the instant case argues that the Teamsters breached its duty of fair representation when it allegedly took no action to protect unit work after he complained of the two-day layoff and/or loss of modular furniture assembly work. However, in fact, the Teamsters did take action in that its business representative met with the Carpenters and reached an agreement as to their respective work jurisdictional claims. Nor did the Teamsters violate the duty of fair representation by failing to inform the Charging Party until the March 11 Section 10(k) hearing of the reasons why it tolerated the Carpenter-represented employees' performance of the modular assembly work. At times, such as where a union denies job rights to a particular employee or where a union refuses to take an employee's grievance to a higher step, the reason for a union's conduct must be produced to enable the Board or the courts to evaluate whether the action was irrational and arbitrary. ⁽⁶⁾ The Board has not generally held that a reason for a union's action or inaction must be articulated to the employees affected by the union's decision. However, in certain circumstances, a union must provide employees it represents with certain types of information requested by the employees. Thus, in Letter Carriers Branch 529, 319 NLRB 879 (1995), the Board found that the union violated its duty of fair representation by refusing to provide an employee with copies of her grievance forms, where there was no countervailing interest to justify the union action. Here, the Teamsters' reason for its conduct was articulated to the Agency and to the Charging Party at the Section 10(k) hearing. Moreover, there is neither claim nor evidence that the Charging Party was prejudiced by the Teamsters' failure to provide the Charging Party with the reason during the period between the date of the agreement with the Carpenters and the date of the 10(k) hearing.

Further, there is at least reasonable cause to believe that Carpenters had created a bona fide jurisdictional work dispute by claiming certain furniture assembly work. Teamsters, by its disclaimer of the work in dispute, took a step to quiet that jurisdictional dispute. In the context of charges alleging an unlawful discharge or layoff of employees as a result of jurisdictional claims, where the actions of a union in claiming the work are "part and parcel of an acute, bona fide jurisdictional work dispute," the Board has determined that Sections 8(b)(2) and 8(b)(1)(A), as well as 8(a)(3) and 8(a)(1), are inapplicable. ⁽⁷⁾ As the Act seeks to resolve jurisdictional disputes, unions have a legally cognizable interest in abating them. When one of the two competing groups of employees effectively renounces its right to the work, the jurisdictional dispute no longer exists. ⁽⁸⁾

The policies underlying those Section 10(k)-related cases would be seriously compromised if a union's conduct in adjusting a jurisdictional dispute were subject to attack as a violation of the duty of fair representation solely because the adjustment resulted in the loss of work by the employees the union represents. ⁽⁹⁾ It would be anomalous to say that a union which seeks to abate a jurisdictional dispute by disclaiming disputed work, even work to which it has legitimate claims, has acted more arbitrarily or capriciously than, for example, a union which lawfully disadvantages some employees by endtailing seniority lists. ⁽¹⁰⁾ The fact that Teamsters reached agreement with Carpenters to preserve for the unit the incidental furniture assembly work distinguishes this case from Regional Import Trucking Co., 292 NLRB 206 (1988), enfd. 914 F.2d 244 (3d Cir. 1990), in which the union ignored employee complaints that the employer was removing work from the unit while enhancing "its own institutional concerns." In that case the union undercut the interest of the represented unit employees to gain benefits for itself

by entering into a "sweetheart" contract at the entity to which unit work was transferred. Id. at 230.

In all these circumstances, we conclude that the Section 8(b)(1)(A) charge should be dismissed, absent withdrawal.

B.J.K.

¹ This clause is mentioned in the record of the Section 10(k) hearing described below but not otherwise described in the file.

² In his February 11 charge, the Charging Party stated that on the date in question, he "told [the Teamsters representative] that we were losing work."

³ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

⁴ *Pacific Maritime Assn.*, 321 NLRB 822, 823 (1996), quoting *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438 (1992) (citations omitted).

⁵ *General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 618 (1975), *enfd.* 545 F.2d 1173 (9th Cir. 1976).

⁶ See, e.g., *General Truck Drivers Local 315 (Rhodes & Jamieson)*, 217 NLRB at 618; *Vaca v. Sipes*, 386 U.S. at 190. But where the facts indicate that the Union's misconduct was nothing more than mere negligence, the Board has excused the union from asserting a reason. *Office & Professional Employees International Union, Local 2*, 268 NLRB 1353, 1356 (1984), *affd.* 765 F.2d 851 (9th Cir. 1985).

⁷ See generally *Brady-Hamilton Stevedore Company*, 198 NLRB 147 (1972), petition for review denied on other grounds, 504 F.2d 1222, 87 LRRM 2544 (9th Cir. 1974); *J. L. Allen Co.*, 199 NLRB 675 (1972); *Cornell-Leach, Gibson Project*, 212 NLRB 495 (1974).

⁸ *Leather Goods Workers Local 349 (Shepard Convention)*, 304 NLRB 642, 643 (1991).

⁹ The Board bases Section 10(k) awards on such other factors as employer preference, employer past practice, area and industry practice, relative skills, and economy and efficiency of operations. *United Brotherhood of Carpenters and Joiners (A.F. Underhill)*, 323 NLRB No. 83 (1997); *International Ass'n of Machinists, Lodge 1743 (J.A. Jones Construction Co.)*, 135 NLRB 1402, 1410-1411 (1962). Some of these factors, e.g., area practice, weigh considerations which are outside the immediate unit and work at issue.

¹⁰ See *Shick v. NLRB*, 409 F.2d 395, 398 (7th Cir. 1969); *Riser Foods*, 309 NLRB 635, 636 (1992) (assuming the union there had DFR obligation towards R & R employees, no violation).